Supreme Court of the United States

OCTOBER TERM 1910

JOHN E. MORE, THOMAS H. KEOGH JOHN F. CALDER, DAVID A. CROW, and WILLARD KINGSLEY,
Plaintiffs in Error

vs.

The People of the State of Michigan by the Attorney General at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney,
Defendants in Error

No. 58.

Supplemental Brief for Defendants in Error

FRANZ KUHN,
Attorney General.

MOSES TAGGART
GANSON TAGGART,
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Authority having been cited by plaintiffs in error we make the further suggestions thereon, and upon other points in the case.

The case of **Omaha vs. Omaha Water Co., 30 Sup. Ct. Rep. 610,** is cited as having an important bearing on the case at bar. This authority does not appear to give any added light to the contention. There a company was given the

right by ordinance to establish and operate water works. At the end of 20 years the city of Omaha was given the right to purchase the works at an appraised valuation to be fixed by three engineers, one selected by the city, one by the company and the third by the two other engineers. Nothing was to be paid for the unexpired franchise in the event of such purchase. The city elected to purchase and appraisers were selected. An award was made and rejected by the city. This court held that the condition of the plant as a going concern should be considered under the contract as fixing the valution.

Here there is no proposition pending to purchase by negotiations or condemnation the property or franchise of the Hydraulic company. The sole and only question in this record is, have the officers of the Hydraulic company the right to act as a corporation under the repealing act of the legislature of the state of Michigan?

I.

POSITIONS OF PLAINTIFFS' COUNSEL.

Counsel for four of plaintiffs say, "Of course the legislature on its own motion, if acting in good faith, could repeal this special charter." (Plaintiffs' Brief p 20.) And further "the courts in the first instance would consider such repealing act valid." (I b) On page 22 they say, "There is a strong presumption that the journals of the legislative body are a correct record of the proceedings; that they tell the truth and the whole truth."

We replied to this on pages 5 to 10 of our original brief. We have shown that this presumption under the authorities cited, both in Michigan as well as outside, is conclusive. The language of Justice Cooley, quoted on page 9 of our original brief, covers the whole ground. The learned counsel for Mr.

Keogh does not join with his associates in the contention of misconduct on the part of the legislature and city officials. Evidently he takes another view of the power of the courts to set aside state legislation. On page 17 of his brief he tacitly concedes the right of the state legislature to end the charter by repeal. At least he does not deny it, but bases his contention upon the assertion that the repealing acts are unconstitutional, "because they impair the obligation of contracts in addition to the repeal of the charter." He assumes that the act takes valuable property and vested rights away from the stockholders and creditors of the company.

The act (and we refer to the later one) neither compelled the company to file a claim against the city nor remove its property therefrom. Neither the circuit or the state supreme court held that it could have that effect, but on the contrary gave to it another construction. The information filed did not tender or raise this question. The construction of this statute by the state supreme court covers and should under the authorities cited, be conclusive. Referring to this contention, Justice Carpenter, for the state supreme court said:

> "The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this and **only this, its right to continue to be a corporation.** It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter and this it had a legal right to take. (105 U. S. 21). These rights it obtained from the legislature of the state of Michigan. By its terms, the law granting these rights, might at any time be repealed by the legislature. The corporation would exist until and only until the legislature repealed the law creating it. The life of this corporation expired according to the terms of the charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right rests upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right." (R pp. 41-42).

The court then passes to the attack and charges of unlawful conduct on the part of city officials, and held, as it has held for years, that such claim "cannot be invoked in this case." (R p. 42). Then it takes up the alleged unconstitutional feature of permission to present a claim against the city and says,

> "It is contended that this provision is unconstitutional because it permits property to be taken for the public without the determination of necessity as provided in the constitution and that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated in the provision. To this there is no constitutional objection. (R pp. 42). The incorporators did not choose to accept it and did not file any claim under the act. The reason is given, we suppose on page 22 of Mr. Forster's brief.

II.

The Legislative Act.

From pages 5 to 14 of our original brief we have answered the attacks upon the repealing statute, by authorities that appear to us conclusive. We wish to add a few words upon the alleged ignorance of the officers of the Hydraulic company of the proposed legislation, although that is not really material.

To the alleged "secret and carefully planned fraudulent scheme to crush the Hydraulic Company," we say there is no evidence or competent allegation even to support the claim. It is stated that the Hon. Edwin F. Sweet, mayor of the city, sent a communication to the council recommending that it ask the legislature to repeal the company's charter, and that the council instructed the city attorney to draw a bill, etc.

The council proceedings of the city are published in the official papers of the city. It is positively required to make contracts with one or more papers of the city to do the printing of its official proceedings. (City Charter, Sec. 137). Courts take judicial notice of the city charter and its requirements. So the officers of the Hydraulic company did have notice of the action of the mayor and council, **constructive, if not actual.**

If an issue must be raised upon every possible assertion, however incompetent or irrelevant, of the irrepressible pleader there would be no end of issues and pleading. The object of a legitimate demurrer is to cut out superfluous allegations.

III.

Questions Before the Court

We submit there is only the question of right of repeal of the corporate franchise of the Hydraulic Company and the right of the directors to act as a body corporate before this court. The information alone raised that question. Both state circuit and supreme courts only passed upon that question, and none other. The rule has been laid down that "questions not directly involved in an appeal and not necessary to the final administration of the case will not be considered by the court."

3 Cyc. 223.
Grant vs. Dryfus, 52 Pac. Rep. 1074; 98 Cal. 603.
Phillips vs. Kalamazoo, 53 Mich. 33.
Johnson vs. Towsley, 13 Wall. 72.

It does not appear upon this record that any federal question was decided other than the right of repeal of the corporate franchise, a right expressly reserved in the state act of 1849. This involved no federal question under the

authorities both state and federal. To give this court jurisdiction it must appear affirmatively on the record not only that a federal question was raised, but that its decision was necessary to the judgment or decree rendered in the case.

Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

Justice Waite in that case uses this language, "It is what was actually decided that we are to consider, not what might have been decided." He also holds (page 137) that the opinion of the state court as to what was decided is controlling.

Only questions raised and decided in the state court can be assigned as error. An assignment of error cannot avail to present a federal question where there is an entire absence in the record showing that such question was decided in the state court.

Fowler vs. Lamson, 164 U. S., 252.

The certificate of the Chief Justice of the state supreme court that a federal question was involved is not properly a part of the record and is in itself insufficient to confer jurisdiction, in this court as showing a federal question, that otherwise would not appear from the record to have been brought to its attention.

Home for Incurables vs. New York, 187 U. S. 155.

Justice Waite, speaking for the court, said, page 158:

> "If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege of immunity secured by the constitution of the United States it is essential under existing statutes that such right, title, privilege or immunity shall have been specially set up or claimed state court.

It appears affirmatively in the opinion of our state supreme court, that it only passed upon the simple question of the right of incorporation and use of the corporate name by plaintiffs in error.

IV.

STATE COURT CONSTRUCTION.

Aside from the construction of the legislative acts by the supreme court of the state of Michigan, the authorities state and federal cited in our original brief we think amply sustain the decision of our supreme court. The construction of state statutes by the highest courts of the state, are followed by this court. (Original Brief pp. 14-18).

The construction of the Michigan supreme court fully sustains (1) the validity of the legislative enactment and that it conforms to state requirements, (2) the conclusiveness of the legislative journals and record bearing upon said enactment, and (3) the construction of the act by the supreme court is conclusive upon the right of repeal and that no vested rights are affected by the repeal.

Respectfully submitted,

FRANZ KUHN,
Attorney General.

MOSES TAGGART
GANSON TAGGART,
Of Counsel.